

TITLE 329 SOLID WASTE MANAGEMENT BOARD
LSA Document #11-454

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from April 11, 2012, through May 11, 2012, on IDEM's draft rule language. IDEM received comments from the following parties:

Stan Pinegar, Indiana Energy Association (IEA)

The following is a summary of the comments received and IDEM's responses thereto.

Comment: 329 IAC 10-39-2(a)(5) provides the financial test option criteria for financial assurance associated with restricted waste sites. We are opposed to the proposed amendments to the current rule outlined in (5)(B) which changes the current requirement that item (i) and **either** item (ii) **or** (iii) be met in order to meet the financial test to a requirement that **all** three of the items be met in order to meet the financial test requirement. As you know, members of the IUG have historically met this test by meeting the requirements of both item (i) (less than 50% of the company's gross revenues are derived from waste management) and item (iii) (the permittee's most recent bond issuance has a favorable rating from Standard and Poor's or Moody's). We believe that the current requirement of meeting the criteria for the two of the three items should remain and that there is no need for the proposed change, particularly for utility permittees.

We understand that IDEM's proposed change is the result of the agency's recent frustration with non-utility restricted waste site operators, which had initially met the financial test under the current provisions and ultimately didn't have the financial means necessary to achieve closure. However, the addition of the requirement to also meet requirements set out in item (ii) (ability to meet various financial criteria) is not necessary for Indiana utilities. Indices associated with item (ii) may change from time to time for utilities based on a number of factors including market and economic conditions, substantial capital outlays for construction and timing of rate case activity. The inability of a utility to meet the proposed section (5) financial test will cause utilities to pursue other options under the rule, such as bonds, insurance, or letters of credit, which only serve to add substantial operating costs. These costs will ultimately be passed on to our ratepaying customers.

The ability to financially support closure of such facilities has never been a problem for Indiana utilities which operate these sites. In addition, the proposed change to eliminate the ability of the permittee to choose between the current options (ii) or (iii) is inconsistent with the EPA's financial assurance regulations for hazardous waste (40 CFR 264), Underground Injection Control facilities (40 CFR 144) and Underground Storage Tanks (40 CFR 280) which all allow the owner or operator the option of choosing either complying with the asset ratio test or the bond rating tests. Utilities are unique from other operators in several ways. Utilities are not

transient and highly regulated by a number of agencies, most notably the Indiana Utility Regulatory Commission (See, for example, IC 8-1-2.3-1, which declares that Indiana shall be divided into designated geographic areas within which an assigned electricity supplier has the sole right to furnish retail electric service to customers). Indiana utilities are in no position to even contemplate abandoning a site. In addition, through existing environmental cost recovery and ratemaking processes and rights, electric utilities will not lack the financial means necessary to achieve closure of such sites.

Response: IDEM agrees. The LSA #11-454 First Notice of Comment Period included an exemption for utility owners and operators from the proposed additional requirement in 329 IAC 10-39-2(a)(5)(B), and IDEM will carry out this intention from the first notice. IDEM will add an exemption from the additional requirement in 329 IAC 10-39-2(a)(5)(B) for utilities regulated by the Indiana Utility Regulatory Commission. IC 8-1-2-16, IC 8-1-2-17, and IC 8-1-2-18 give IURC the authority to inspect, examine, and audit the accounts of regulated utilities. As described in 329 IAC 10-39-2(a)(5)(F), the commissioner can determine if other qualifications may be cause for disallowance of the use of the financial test. According to this citation, the commissioner can use the information collected by the IURC as a cause for disallowance. The utility will then be required to obtain a different financial assurance mechanism.

Also, the current phrase “net working capital” in 329 IAC 10-39-2(a)(5)(B)(ii)(BB) was deleted from the draft rule in the second notice, but is now restored in the proposed rule because the exclusion for utilities is in the proposed rule.

The additional requirement in 329 IAC 10-39-2(a)(5)(B) will remain for non-utility restricted waste sites that do not submit financial information to the IURC on an annual basis.

Comment: The IUG also requests the rule include an additional provision in 2(a)(5). Consistent with U.S. EPA provisions, we suggest the rule allow for the alternative option of using a parent company’s assets to meet the financial assurance requirements set out in the rule. This option would be accomplished by including a corporate guarantee by a parent company or entity with a controlling interest in the owner or operator of the restricted waste facility. The option would require the guaranteeing entity would need to clearly meet the specified financial criteria as set out in the rule. U.S. EPA regulations currently provide for such an alternative guarantee option in the UST regulations at 40 CFR §280.96, the hazardous waste regulations at 40 CFR §264.147(g) and the UIC regulations at 40 CFR §144.63(f)(10).

Response: Multi-national facilities with headquarters in foreign countries operate some of the restricted waste sites in Indiana. According to 329 IAC 10-39-2(a)(5), guarantors must meet the conditions of the corporate financial test for restricted waste sites and submit the required reporting items. The tests underpinning the corporate guarantee require a prescriptive, detailed review process. It is essential to confirm that the financial data used in the chief financial officer’s letter are that of the owner or operator, and not an affiliated company.

The domestic asset requirement, known as “Minimum Tangible Net Worth,” is intended to ensure that the IDEM has access to funds in the event of bankruptcy. Without this requirement, the IDEM could experience substantial difficulty in accessing funds of bankrupt

facilities that have their assets outside of the United States. Allowing the parent corporation guarantee will make it difficult for IDEM to hold the foreign parent corporation accountable. The concerns range from apparent inadequacies of the test itself to implementation issues related to the difficulty of oversight and the adequacy of expertise available to review test submissions. IDEM does not have the adequate resources to recover the costs of closure and post-closure liabilities from foreign companies during sudden impact of external or market shocks on the guarantor's financial condition.

Comment: Finally, IUG has one additional suggestion for the existing provision at (5)(B)(ii)(bb), which currently states: “(bb) A ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than one-tenth (0.1).” The IUG is concerned about scenarios in which a company incurs a large impairment charge and the possibility that such company could fail this test in the future. Impairment charges are non-cash expenses that factor into net income. They are similar to the depreciation costs we already adjust for in this ratio and do not impact our cash flow.

The IUG recommends the provision be amended slightly, to read as follows: “(bb) A ratio of the sum of net income plus depreciation, depletion, ~~and~~ amortization, **and impairments** to total liabilities greater than one-tenth (0.1).”

Response: Impairment charge is a specific reduction on a company's balance sheet that adjusts the value of a company's goodwill. Impairment charges are not included in IDEM's or EPA's current financial assurance requirements for any type of waste, including restricted waste sites, solid waste landfills, hazardous waste, underground storage tanks, or underground injection control. IDEM does not have information on how this inclusion will conform to the professional auditing standards based on agreed upon procedures. The addition of impairments will serve to pad the financial ratios without improving the strength of the restricted waste sites financial test, which is one of the main goals of this rulemaking. In addition, there is a possibility that a change in the rule to allow impairment charges could make the state regulations less stringent than the federal regulations.